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Before the
Federal Communications Commission
Washington, D.C. 20554

DEC - 8 2009
FCC Mail Room

In the matter of the)
Interpretation of Section 271 of the)
Telecommunications Act of 1996 As)
To Whether the Statutory Listing of)
Loops and Transport Includes the)
Requirement That Existing Dark Fiber)
Be Made Available to Competitors)

December 2, 2009

CC Docket No. 2009-

**THE MAINE PUBLIC UTILITIES COMMISSION'S AMENDED PETITION FOR A
DECLARATORY RULING**

**NOTE: THIS PETITION AMENDS THE MAINE PUBLIC UTILITIES COMMISSION'S
PETITION FOR A DECLARATORY RULING DATED NOVEMBER 25, 2009**

Pursuant to 47 C.F.R. Section 1.2, the Maine Public Utilities Commission ("MPUC") hereby petitions the Federal Communications Commission ("FCC") to issue a declaratory ruling on the question of whether carriers subject to section 271 of the Telecommunications Act of 1996 must make line sharing, certain dark fiber loops,¹ dark fiber transport facilities, and dark fiber entrance facilities available to competitors seeking access and interconnection services. Specifically, the MPUC requests that the FCC determine whether line sharing, certain dark fiber loops, dark fiber transport, and dark fiber entrance facilities are facilities falling within items four and/or five of the "competitive checklist" found in 47 U.S.C. § 271(c)(2)(B)(iv),(v) such that Northern New England Telephone Operations, LLC, d/b/a/ FairPoint Communications-NNE

¹ The MPUC has held that while there is no Section 271 access to dark fiber loops which are part of Fiber to the Home ("FTTH") or Fiber to the Curb ("FTTC") loops to mass market customers, non-FTTH and non-FTTC dark fiber loops serving enterprise customers are included in the FCC's definition of loops pursuant to Checklist Item No. 4 in Section 271. *Investigation into Verizon's Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, No. 2002-682, Order at 23 (Sept. 13, 2005).

("FairPoint") must provision line sharing, certain dark fiber loops, dark fiber transport and dark fiber entrance facilities to competitors seeking access and interconnection services from FairPoint in Maine. The MPUC submits this Petition for the purpose of meeting its obligations to the parties in the matter of Northern New England Telephone Operations, LLC, d/b/a FairPoint Communications v. Maine Public Utilities Commission et al., No. 06-CV-183 (D. Me.)

In its Order approving the Section 271 petition of Verizon New England, Inc, ("Verizon") (FairPoint's predecessor as the Regional Bell Operating Company ("RBOC") in Maine), the FCC made no specific mention of dark fiber transport. *Application by Verizon New England Inc., for Authorization to Provide In-Region, InterLATA Services in the State of Maine*, Order, 17 FCC Rcd 11676 (2002) ("Maine 271 Order"). However, in the *Pennsylvania 271 Order*, the FCC referred to Verizon's compliance with Checklist Item No. 5⁷ in the context of requiring Verizon to file tariffs with the Pennsylvania PUC for its dark fiber offerings. *Application of Verizon Pennsylvania Inc., for Authorization to Provide In-Region, InterLATA Services in the State of Pennsylvania*, Order, 16 FCC Rcd 17419 at ¶ 109, n. 372 (2001) ("Pennsylvania 271 Order"). Likewise, in the *Arkansas/Missouri 271 Order*, the FCC relied upon Southwest Bell's affidavit stating that it provided non-discriminatory access to dark fiber as evidence that it provided access to dedicated transport. *Joint Application by SBC Communications Inc., for Authorization To Provide In-Region, InterLATA Services in Arkansas and Missouri*, Order Granting Application, 16 FCC Rcd 20719 at ¶¶ 116, n.365 (2001) ("Arkansas/Missouri 271 Order"). Similarly, in both the *Rhode Island 271 Order* and the *Vermont 271 Order*, the FCC addressed arguments by a CLEC that Verizon's dark fiber offering did not meet the

Checklist's requirements. *Application of Verizon New England Inc., for Authorization To Provide In-Region, InterLATA Services in Rhode Island*, Order Granting Application, 17 FCC Rcd 3300 at ¶¶92-93 (2002) ("Rhode Island 271 Order"); *Application of Verizon New England Inc., for Authorization to Provide In-Region, InterLATA Services in Vermont*, Order Granting Application, 17 FCC Rcd 7625 at ¶¶ 56-57 (2002) ("Vermont 271 Order"). Although in each of these Orders the FCC rejected the CLECs' complaints on other grounds, in none of these decisions did the FCC alter the underlying assumption that dark fiber is a requirement of Checklist Item No. 5. *Id.*

Regarding dark fiber entrance facilities, in Appendix D to the *Maine 271 Order*, in the section discussing Checklist Item No. 5, the FCC stated that it "required that BOCs provide both dedicated and shared transport to requesting carriers." *Maine 271 Order*, Appendix D. In addition, the FCC stated that dedicated transport includes transmission facilities between "the wire centers of BOCs and requesting carriers," i.e., entrance facilities. *Maine 271 Order* at n. 448. It thus appears that the FCC has interpreted the local transport requirement of Checklist Item No. 5 as requiring access to entrance facilities.

The MPUC has ruled that certain dark fiber loops, dark fiber transport and dark fiber entrance facilities must be provisioned to competing carriers by Verizon pursuant to Checklist Item No. 4 and/or Checklist Item No. 5. *Investigation into Verizon's Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, No. 2002-682, Order at 23, 38-44 (Sept. 13, 2005). Likewise, the MPUC, consistent with the FCC's interpretation that § 271's loop requirement includes line sharing, has ruled that

Checklist Item No. 4 requires provisioning of line sharing. The correctness of these determinations was challenged by Verizon in the context of a lawsuit brought in the United States District Court for the District of Maine, *Verizon New England, Inc. v. Me. Pub. Utilities Comm'n*, 441 F. Supp. 2d 147 (D. Me. 2006), and in a subsequent appeal before the First Circuit Court of Appeals, *Verizon New England, Inc. v. Me. Pub. Utilities Comm'n*, 509 F.3d 1, *rehearing denied* 509 F.3d 13 (1st Cir. 2007). The District Court agreed with the MPUC, holding that "the elements found by the [M]PUC to be included in checklist items 4 and 5 are required by § 271." *Verizon New England, Inc.*, 441 F. Supp. 2d at 153. On appeal, the First Circuit held that the matter of interpreting Section 271 with regard to line sharing and dark fiber is complicated and technical and "ought to be resolved" by the FCC which is the "expert agency charged with administering section 271." *Verizon New England*, 509 F.3d. at 11. Consequently, the First Circuit directed the District Court to refer the matter to the FCC. *Id.* at 12.

On remand to the District Court, FairPoint moved to dismiss its own complaint, citing the agreement of the parties to seek a determination of the issue from the FCC. The District Court granted FairPoint's motion to dismiss.

In furtherance of the foregoing, the MPUC hereby requests the FCC make a determination as to whether items four and five of the "competitive checklist" found in 47 U.S.C. § 271(c)(2)(B)(iv),(v) require that FairPoint make certain dark fiber loops, dark fiber transport, dark fiber entrance facilities, and line sharing available to competitors seeking access and interconnection services from FairPoint in Maine.

The MPUC is filing this petition in furtherance of the agreement of the parties in connection with the District Court action discussed above, but expressly reserves and

does not waive such jurisdiction as resides with the MPUC to enforce the obligations of FairPoint as they relate to the provision of certain dark fiber loops, dark fiber transport, dark fiber entrance facilities, and/or line sharing. Likewise, by filing this petition the MPUC expressly reserves and does not waive any and all arguments as may be advanced to support the proposition that items four and five of the "competitive checklist" found in 47 U.S.C. § 271(c)(2)(B)(iv),(v) require that FairPoint make certain dark fiber loops, dark fiber transport, dark fiber entrance facilities, and line sharing available to competitors seeking access and interconnection services from FairPoint in Maine.

Respectfully Submitted,



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PROOF OF SERVICE

**THE MAINE PUBLIC UTILITIES COMMISSION'S AMENDED PETITION FOR A
DECLARATORY RULING**

I, Jordan D. McColman, Esq. do hereby certify that the following parties were served, by U.S. Mail, with the Maine Public Utilities Commission's Amended Petition for a Declaratory Ruling dated December 2, 2009, in the above captioned matter:

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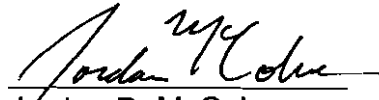
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Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Jordan D. McColman", with a horizontal line drawn underneath it.

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